such an attempt at error correction provides no basis for a grant of *certiorari*. See *Watt* v. *Alaska*, 451 U.S. 259, 275 (1981) ("Most certainly, this Court does not sit primarily to correct what [it] perceive[s] to be mistakes committed by other tribunals.") (Stevens, J., concurring). Moreover, Petitioners' substantive attack on the decision below cannot withstand scrutiny.

I. THERE IS NO DECISIONAL CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS REVIEW BY THIS COURT.

A. The Eleventh Circuit's Holding Is In Line With The Overwhelming Majority Of Federal Courts That Have Directly Addressed The Question Presented.

The Eleventh Circuit correctly held that "in order to prevail under the PSA , a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." Pet. App. 15a. In so holding, the Eleventh Circuit joined the overwhelming majority of federal courts of appeals that have addressed this issue.

Specifically, the Seventh Circuit has held that Section 202(a) of the PSA (7 U.S.C. § 192(a)) requires "either intent or adverse competitive effect." *Armour & Co.* v. *United States*, 402 F.2d 712, 717-18 (7th Cir. 1968) (interpreting the 7th Circuit's decision in *Swift & Co.* v. *Wallace*, 105 F.2d 848 (7th Cir. 1939)); *Wilson & Co.* v. *Benson*, 286 F.2d 891 (7th Cir. 1961); *Swift & Co.* v. *United States*, 308 F.2d 849 (1962). See also *Armour*, 402 F.2d at 717 ("words such as 'unfair' and 'unjustly' in Section 202(a) ... require some examination of [a defendant's] intent and the likely effects of its acts or practices under scrutiny"); *Pac. Trading Co.* v. *Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976) ("the purpose of [the PSA] is to halt unfair business practices which adversely affect competition, not shown here").

The Eighth Circuit has also held that a Section 202(a) plaintiff must prove a competitive injury. That circuit has held that under Section 202(a) "a practice is 'unfair' ... if it injures or is likely to injure competition." *Farrow* v. *United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985). See also *IBP, Inc.* v. *Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (agreement providing for right of first refusal did not violate Section 202(a) where it did not "potentially suppress or reduce competition sufficient to be proscribed by the Act").

The Ninth Circuit, too, has held that, at the very least, Section 202(a) requires "a reasonable likelihood that ... the result [of a practice] will be an undue restraint of competition." *DeJong Packing Co.* v. *United States Dep't of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980). As the court explained, "while § 202 of the [PSA] may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation," including the requirement that "unfair" conduct must adversely affect competition to be actionable. *Id.* at 1335 n.7.

Similarly, in an unpublished decision the Fourth Circuit has held that a Section 202(a) plaintiff must establish at least "'the likelihood that an arrangement will result in competitive injury.'" *Philson* v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998) (table), *available at* 1998 WL 709324, at *4 (quoting *Farrow*, 760 F.2d at 215). This principle has been repeatedly applied by district courts within the Circuit. See *Griffin* v. *Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) ("only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act") (internal quotation marks omitted); *Philson* v. *Cold Creek Farms*, 947 F. Supp. 197, 201 (E.D.N.C. 1996) (Section 202(a) "is a general mandate against unfair acts by live poultry dealers which adversely affect competition").

It is evident, therefore, that the Eleventh Circuit's decision is plainly in line with numerous other circuits that have directly addressed the issue. As will be shown below, Petitioners' assertion regarding a circuit conflict is illusory. There is no conflict in the circuits that warrants resolution by this Court and the petition for certiorari should be denied.

B. There Is No Ninth Circuit Authority That Conflicts With The Eleventh Circuit's Decision.

Petitioners rely primarily on one decision in their effort to establish a conflict with the Ninth Circuit: *Spencer Livestock Commission Co.* v. *Department of Agriculture*, 841 F.2d 1451 (9th Cir. 1988). *Spencer* involved an appeal from an administrative ruling by the United States Department of Agriculture ("USDA") that a livestock dealer violated Section 312 of the PSA, which was subsequently codified at 7 U.S.C. § 213(a) ("Section 213").[4] Because the *Spencer* court addressed violations of Section 213(a), it had no cause to examine or interpret Section 202(a), and thus did not perform a competitive impact analysis. As such, its conclusion does not create a conflict in view of the case law in that Circuit construing Section 202(a) in a manner identical to that of the Eleventh Circuit.[5]

Specifically, in *DeJong*, the Ninth Circuit held that, at the very least, Section 202(a) requires "a reasonable likelihood that...the result [of a practice] will be an undue restraint of

---

[4] Courts have used various citation methods in discussing the provisions of the PSA. Sometimes courts refer to the PSA by citing the sections of the original Act and sometimes courts cite to the codification of those provisions in 7 U.S.C. For purposes of clarity, Section 202 of the PSA has been codified at 7 U.S.C. § 192. Section 312 of the PSA has been codified at 7 U.S.C. § 213.

[5] Tellingly, Petitioners do not (and cannot) cite any portion of *Spencer* that concludes that termination of a contract without economic justification—the action at issue in this case—amounts to a per se violation of Section 202(a).

competition." *DeJong*, 618 F.2d at 1337. In recognizing this competitive injury requirement, the court explained, the PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *Id.* at 1335 n.7. Unlike the court in *Spencer*, the *DeJong* court actually construed Section 202, and properly considered the PSA's antitrust ancestry when holding that a plaintiff must, at a minimum, show a "reasonable likelihood" that competition will be adversely affected.

Given the holding in *DeJong*, the subsequent *Spencer* decision cannot be classified as the Ninth Circuit's controlling voice on the meaning of Section 202(a). Both *DeJong* and *Spencer* were decided by three judge panels. It is well settled in the Ninth Circuit that three-judge panels are "bound by ... prior decisions interpreting state as well as federal law in the absence of intervening controlling authority." *FDIC* v. *McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992). See also *Landreth* v. *Commissioner*, 859 F.2d 643, 648 (9th Cir. 1988) (subsequent panels cannot overrule prior panels absent intervening authority). Accordingly, *Spencer* cannot and should not be stretched to deviate from the Ninth Circuit's prior construction of Section 202(a)—a construction that parallels that of the Eleventh Circuit.

In another attempt to create a circuit conflict, Petitioners cite *Blackfoot Livestock Commission Co.* v. *Department of Agriculture*, 810 F.2d 916, 922 (9th Cir. 1987) for the proposition that "the Ninth Circuit had upheld a USDA determination that check-kiting violates the PSA because it is 'deceptive.'" Pet. 8. What Petitioners fail to disclose, however, is that *Blackfoot* was also construing Section 213 when the court concluded that such action violated the PSA. See 810 F.2d at 922. ("Registered auctions are prohibited from using deceptive practices in connection with the sale of livestock.") (citing 7 U.S.C. § 213(a)). Because *Blackfoot* did not address alleged violations of Section 202, it did not cite the Ninth Circuit's prior decision in *DeJong* as controlling au-

thority and had no cause to conduct a competitive impact analysis. Therefore, *Blackfoot* is not in conflict with the Ninth Circuit's previous (and sound) interpretation of Section 202.

Finally, Petitioners cite *Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971), in a last ditch effort to generate a conflict. Petitioners claim that *Sebastopol* holds that "a failure to pay money when owed—essentially a breach of contract—violate[s] [section 202(a)]." Pet. 8. This statement is inaccurate. *Sebastopol* did *not* hold that the activity in question violated Section 202(a). Rather, the court only adjudicated the propriety of the USDA's issuance of a cease and desist order against the president of a company in his individual capacity. *Sebastopol*, 440 F.2d at 983 ("[T]he *only* issue for our consideration is the propriety of that part of the cease and desist order which runs against Singleton as an individual, as distinguished from Singleton as an officer of the corporation.") (emphasis added). As such, under any fair reading of the opinion, Petitioners' implication that the Ninth Circuit equates a "failure to pay" with a "breach of contract" is wrong. *Sebastopol* in no way negated the Ninth Circuit's previous interpretation of Section 202(a) in *DeJong*.

In sum, there is no Ninth Circuit authority that conflicts with the Eleventh Circuit's decision below. To the contrary, the law of the Ninth Circuit squarely conforms to the holding of the Eleventh Circuit in this action.

C. There Is No Tenth Circuit Authority That Conflicts With The Eleventh Circuit's Decision.

Petitioners cite two decisions as support for their assertion that the Eleventh Circuit's decision conflicts with the Tenth Circuit: *Hays Livestock Commission Co.* v. *Maly Livestock Commission Co.*, 498 F.2d 925 (10th Cir. 1974) and *Peterman* v. *USDA*, 770 F.2d 888 (10th Cir. 1985). Neither of these cases addressed the question presented to the Elev-

enth Circuit, nor did they necessitate interpretation of Section 202(a).

Hays involved the appeal of reparation orders entered against a registered and bonded livestock dealer, and a registered and bonded marketing agent. *Hays*, 498 F.2d at 927. The *Hays* court made clear at the outset of its opinion that the appeal involved only one provision of the PSA. The court stated: "These cases are predicated *on § 208*, which prohibits 'every unjust, unreasonable, or discriminatory regulation or practice' in respect to the furnishing of stockyard services." *Id.* (emphasis added). In short, *Hays* did not construe Section 202(a) and therefore clearly did not hold that a competitive injury is unnecessary to prevail under that provision.[6]

Petitioners' citation to *Peterman* is equally unavailing. The *Peterman* court affirmed an administrative decision that the defendant's "bait and switch" sales tactics were "deceptive" trade practices. The court does not, however, indicate the specific provision of the PSA that the defendant violated, so it can hardly be cited as a controlling interpretation of the meaning of Section 202(a). See *Peterman*, 770 F.2d at 888-90. Several of the PSA's provisions prohibit "deceptive" trade practices, including Section 213(a). See 7 U.S.C. § 213(a). Moreover, what is clear from *Peterman* is that the court did *not* consider or rule upon the issue presented in this case—whether Section 202(a) contains a competitive impact re-

---

[6] If anything, *Hays* lends support to the Eleventh Circuit's decision. The court recognized the primary legislative objective behind the PSA's passage—to combat monopolies. The *Hays* court stated that "the 'chief evil' sought to be prevented or corrected is monopolistic practices in the livestock industry." *Hays*, 498 F.2d at 927 (citing *Mahon* v. *Stowers*, 416 U.S. 100 (1974) and *Stafford* v. *Wallace*, 258 U.S. 495 (1922)). Additionally, the court recognized that the PSA did not prescribe unlimited duties to or unlimited powers on the Secretary of the USDA. See *Hays*, 498 F.2d at 930 ("Federal courts have been at pains to point out that the [PSA] did not make of the Secretary a collecting agency."). The court made this point to support its conclusion that the PSA was not designed to microscopically adjudicate all perceived statutory violations. *Id.*

quirement. Because the *Peterman* court did not address that issue, Petitioners cannot credibly claim that *Peterman*'s holding in any way conflicts with the Eleventh Circuit's decision. As such, Petitioners have proffered no authority from the Tenth Circuit holding that a competitive injury is not required under Section 202(a).

* * * *

Petitioners cite no authority that conflicts with the Eleventh Circuit's holding below. As a result, Petitioners have failed to establish that a conflict exists warranting certiorari. The petition should be denied.

II. PETITIONERS WAIVED AN ISSUE OF LAW CRITICAL TO THIS COURT'S REVIEW OF THE ISSUE PRESENTED.

Petitioners argue that the Eleventh Circuit erred because some plaintiffs may be able to prove a violation of Section 202(a) without proving that the defendant's conduct had an anticompetitive effect on the relevant market. See Pet. 10-16. But the Eleventh Circuit did not disagree. Rather, the court of appeals stated that it declined to adopt a disjunctive test in this case because Plaintiffs "failed to preserve the question" whether it would be sufficient for a plaintiff to show that a defendant acted with predatory intent, regardless of any anticompetitive effect that resulted from the defendant's actions. Pet. App. 15a n.8.

In fact, not only did Petitioners fail to preserve this critical legal issue, they also failed to present any evidence that could support a finding of predatory intent even if the Court were to raise the issue *sua sponte*. See Pet. App. 15a n.8 ("assuming *arguendo* that we did adopt a disjunctive test for proving Section 202(a) violations, the Londons still would not prevail .... [because at] trial they did not present any evidence of Fieldale's alleged predatory intent in terminating the grower contracts").

As a result, this case does not present the Court with an opportunity to consider whether plaintiffs can recover under Section 202(a) only if they demonstrate an anticompetitive effect on the relevant market to prove a violation of Section 202(a). Thus, even if the courts were divided on the issue presented (and they are not), this case is not an appropriate vehicle for this Court's review.

III. PETITIONERS COULD NOT PREVAIL UNDER ANY LEGAL STANDARD.

Petitioners' case suffers from another defect that renders it an inappropriate vehicle for consideration of the meaning of Section 202(a). Plaintiffs failed to present sufficient evidence to prevail under any legal standard. As the Eleventh Circuit noted, Petitioners' PSA claims are based on the theory that Fieldale retaliated against Petitioners and terminated their contracts without economic justification because Harold testified in a race discrimination lawsuit against Fieldale. See Pet. App. 4a-5a, 16a & n.9. But, the court of appeals stated that Petitioners "did not present any evidence that Fieldale retaliated against them after Harold testified in the discrimination lawsuit." *Id.* at 16a n.9. As a result, Petitioners cannot prevail in this case regardless of whether this Court were to adopt the interpretation of Section 202(a) they advance. This evidentiary failure undermines petitioners' effort to have this Court address the meaning of Section 202(a) in the context of this case.[7]

---

[7] Because the district court granted judgment as a matter of law on their PSA claims, Petitioners assert that the legal standard the lower courts applied is "indisputably outcome determinative." Pet. 23. The Eleventh Circuit's conclusion that Petitioners failed to present sufficient evidence to sustain their claims even under the theory Petitioners advance contradicts this assertion.

IV. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS.

Petitioners assert that this Court should grant certiorari "because the decision below is wrong." Pet. 10. Standing alone, this is no reason to grant certiorari. See *Watt* v. *Alaska*, 451 U.S. 259, 274-75 (1981) (Stevens, J. concurring). Moreover, although this is not the place for an extended debate over the merits, the Eleventh Circuit's decision that a Section 202(a) plaintiff must demonstrate an adverse effect on competition is indisputably correct.

When determining the meaning of a statute, this Court looks to the particular statutory language and to the design of the statute as a whole. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). See also *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). As noted above, numerous lower federal courts have concluded that Section 202(a)'s text incorporates a competitive impact requirement. The Seventh Circuit's ruling in *Armour & Co.* v. *United States*, 402 F.2d at 720, is instructive. In *Armour*, the court conducted a thorough analysis of the PSA's language, structure and purpose. The court stated:

> [s]urely words such as "unfair" and "unjustly" in Section 202(a) and "undue" and "unreasonable" in Section 202(b) *require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny.*

Id. at 717 (emphasis added).

The overwhelming majority of courts that have addressed this issue have reached the same conclusion. See *Jackson* v. *Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (quoting *Jackson* v. *Swift-Eckrich, Inc.*, 836 F. Supp. 1447, 1456 (W.D. Ark. 1993)); *Farrow*, 760 F.2d at 214; *De Jong*, 618 F.2d at 1336-37; *Pac. Trading Co.*, 547 F.2d at 369; *Bruhn's Freezer Meats* v. *United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971); *Armour*, 402 F.2d at 717;

London v. *Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005); *Griffin*, 183 F. Supp. 2d at 827; *Philson*, 947 F. Supp. at 200.

As the *Armour* court observed, the PSA's legislative history "fully supports" the conclusion that the lower federal courts have drawn from the text and structure of the PSA: *viz* that "Section 202(a) was not directed at [a practice] unless there was some intent to eliminate competition or unless the effect of the [practice] might lessen competition." *Armour*, 402 F.2d at 720. In fact, the Senate Committee Report "makes it clear that this part of the legislation was promoted primarily by *fear of monopoly and predation*." *Id.* (emphasis added) (citing S. Rep. No. 66-429, at 1, 3 (1921)). Furthermore, the House Committee noted that the Act was "aimed a halting 'a general course of action *for the purpose of destroying competition.*'" *Id.* (emphasis added) (quoting H.R. Rep. No. 66-1297, at 11 (1921)). The legislative history, therefore, fully supports this Court's observation that the PSA was passed to combat the "chief evil" of the "monopoly of the packers." *Stafford* v. *Wallace*, 258 U.S. 495, 514-15 (1922).

V. THIS COURT SHOULD REJECT PETITIONERS' REQUEST FOR ERROR CORRECTION IN THE ELEVENTH CIRCUIT'S APPLICATION OF *CHEVRON*.

Petitioners claim that the Eleventh Circuit erred by "declining to defer to USDA's interpretation of the phrase 'unfair, unjustly discriminatory, or deceptive." Pet. 16. This assertion provides no basis for granting certiorari. Petitioners do not claim (nor could they) that the Eleventh Circuit conflicts with other courts of appeal in the application of *Chevron, U.S.A, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), and it progeny.

Moreover, Petitioners' request for error correction in the Eleventh Circuit's application of *Chevron* is without merit. The intent of Congress in passing the PSA is clear, and even

if that intent were ambiguous, the USDA has never taken a consistent view that a claimant can succeed under Section 202 while failing to show an adverse effect on competition. In fact, the USDA's previous decisions applying section 202(a) have specifically inquired whether the conduct at issue caused (or was likely to cause) an anticompetitive effect. For example, in *Corn State Meat Co.*, 45 Agric. Dec. 995, 1023 (1986), cited prominently by Petitioners, the Judicial Officer held that "[s]ince commercial bribery is inherently unfair, unjustly discriminatory and deceptive, it is not necessary to show in a particular case that the commercial bribery involved caused injury or was likely to cause injury." As the Judicial Officer explained, "[c]ommercial bribery is considered unfair ... because of its actual and possible effects on competition." *Id.* at 1022. Moreover, in *IBP, inc.*, 57 Agric. Dec. 1353 (1998), *reversed on other grounds sub nom. IBP, Inc.* v. *Glickman*, 187 F.3d 974 (8th Cir. 1999), the USDA determined that an "injury to competition" *must* be proven to establish a violation of Section 202. *Id.* at 1377.

It is well settled that an agency's interpretation of a statute that conflicts with prior interpretation "is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994) (internal quotation marks omitted). The Eleventh Circuit properly applied that principle here.

VI. THERE IS NO COMPELLING REASON TO GRANT IMMEDIATE REVIEW OF THIS ISSUE.

Finally, there is no reason to believe the Eleventh Circuit's decision will have the apocalyptic public policy ramifications that Petitioners suggest.[8] See Pet. 19-23. As noted above, a

---

[8] Petitioners make much of their allegation that contract farmers lack relative bargaining power. Pet. 19-23. This extra-record discussion is both irrelevant to the petition and incorrect. In fact, the "complaints" set forth by Petitioners on behalf of growers are being addressed by the individual states. For instance, in 2004 the Georgia General Assembly

number of circuits have held that Section 202(a) requires a showing of anticompetitive effects. Many of these holdings have been the law of the relevant circuits for decades. See, *e.g.*, *Wilson & Co.*, 286 F.2d at 895; *Swift & Co.*, 308 F.2d at 853; *Armour*, 402 F.2d at 717; *Pac. Trading Co.*, 547 F.2d at 369-70; *DeJong*, 618 F.2d at 1337; *Farrow*, 760 F.2d at 214; *IBP, Inc.*, 187 F.3d at 977. Yet there is no evidence that these precedents have led to a public policy crisis. Moreover, Petitioners' claim that contract growers lack any judicial remedies outside the PSA is belied by the fact that Petitioners asserted various state law claims based on the conduct alleged in this case. See Pet. App. 17a (analyzing Petitioners' state law claims).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

STEVEN P. GILLIAM *
R. BRENT HATCHER, JR.
SMITH, GILLIAM, WILLIAMS,
& MILES, P.A.
200 Old Coca-Cola Building
301 Green Street, N.W.
P.O. Box 1098
Gainesville, GA 30503
(770) 536-3381

Counsel for Respondent

October 28, 2005

* Counsel of Record

---

enacted legislation to give growers various additional rights in the process of entering into and canceling poultry growing contracts. See Ga. Code. Ann. § 2-22-2.

3

Supreme Court, U.S.
FILED
NOV 9 - 2005
OFFICE OF THE CLERK

No. 05-411

IN THE
Supreme Court of the United States

HAROLD BRUCE LONDON and
CHRISTINE SAUNDERS LONDON,
Petitioners,
v.

FIELDALE FARMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, DC 20016
(202) 237-7543

Cynthia Noles Johnson
Post Office Box 48
Cohutta, GA 30710
(706) 694-4298

Michael T. Kirkpatrick
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

November 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY 1

A. Respondent Attempts To Avoid The Circuit Split By Ignoring The Well-Established Rule That Identical Language In Different Parts Of The Same Statute Should Be Given The Same Meaning. 2

B. There Is A Conflict Among The Federal Courts Of Appeals. 3

C. This Case Presents An Excellent Vehicle To Address And Resolve The Circuit Split. 6

D. Respondent Does Not Meaningfully Address The Importance Of The Question Presented, The Disruptive Effect Of The Eleventh Circuit's Failure To Defer To The USDA, Or The Merits Of The Case. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Blackfoot Livestock Comm'n Co. v. Dep't of Agric.,
810 F.2d 916 (9th Cir. 1987) 2

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 7

Comm'r of Internal Revenue v. Lundy,
516 U.S. 235 (1996) 3

De Jong Packing Co. v. USDA,
618 F.2d 1329 (9th Cir. 1980) 4, 5

Farrow v. USDA,
760 F.2d 211 (8th Cir. 1985) 6

Hays Livestock Comm'n Co., Inc. v. Maly Livestock Comm'n Co., Inc.,
498 F.2d 925 (10th Cir. 1974) 2, 6

Parchman v. USDA,
852 F.2d 858 (6th Cir. 1988) 6

Peterman v. USDA,
770 F.2d 888 (10th Cir. 1985) 2, 5

Spencer Livestock Comm'n Co. v. Dep't of Agric.,
841 F.2d 1451 (9th Cir. 1988) 1, 4, 8

Sullivan v. Stroop,
496 U.S. 478 (1990) 3

United States v. Donahue Bros.,
59 F.2d 1019 (8th Cir. 1932) 6

Utah Pie Co. v. Cont'l Baking Co.,
386 U.S. 685 (1967) 7

Van Wyk v. Bergland,
570 F.2d 701 (8th Cir. 1978) 6

Statutes

Packers and Stockyards Act § 202(a),
7 U.S.C. § 192(a) 1, 2

Packers and Stockyards Act § 307,
7 U.S.C. § 208 6

Packers and Stockyards Act § 312(a),
7 U.S.C. § 213(a) 1, 2

Legislative History

S. Rep. No. 66-429 (1920) 10

PETITIONERS' REPLY

The Brief in Opposition (BIO) attempts to explain away the conflict among the circuits concerning the scope of the Packers and Stockyards Act (PSA) by narrowing the question presented. According to respondent, the question is not the one identified by the Eleventh Circuit in the decision below—whether "only those unfair, discriminatory or deceptive practices affecting competition are prohibited by the PSA." Pet. App. 11a. Instead, respondent argues that there is no conflict among the circuit courts "on the specific PSA issue" decided by the Eleventh Circuit in this case (BIO 4), because this case was brought under § 202(a) of the PSA, 7 U.S.C. § 192(a), and some of the conflicting decisions were brought under § 312(a) of the PSA, 7 U.S.C. § 213(a). Respondent simply ignores the fact that both PSA sections use identical language to prohibit "any unfair, unjustly discriminatory, or deceptive practice or device."

Respondent also ignores the Eleventh Circuit's recognition that its decision in this case conflicts with the Ninth Circuit's conclusion that the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics." *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1455 (9th Cir. 1988); *see* Pet. App. 11-12a. Rejecting that proposition, the Eleventh Circuit chose to "join those circuits"—including the Seventh and, in the court's view, the Eighth—"that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition." Pet. App. 12a.

The conflict among the courts concerns the scope of the PSA *as a whole*. Regardless of whether a case is controlled by PSA § 202(a) or PSA § 312(a), the question presented remains: Does the PSA's prohibition of "unfair, unjustly discriminatory, or deceptive practices or acts" extend to all such practices, or

only to practices that have or are likely to have an adverse effect on competition? It is that basic question over which the circuits have divided and to which only this Court can provide a definitive answer.

A. Respondent Attempts To Avoid The Circuit Split By Ignoring The Well-Established Rule That Identical Language In Different Parts Of The Same Statute Should Be Given The Same Meaning.

Respondent suggests that "[t]here is no conflict in the circuits that warrants resolution by this Court" because some of the decisions in conflict rest on two different sections of the PSA. BIO 8. Thus, for example, respondent dismisses the conflict between the decision below and the Ninth Circuit's decision in *Spencer* solely because *Spencer* addressed violations of 7 U.S.C. § 213(a) rather than 7 U.S.C. § 192(a) (BIO 8), even though the court below did not draw such a distinction and specifically cited *Spencer* as taking the opposite stance on the issue presented here. Pet. App. 12a. For the same reason, respondent dismisses the conflict evident from *Blackfoot Livestock Comm'n Co. v. Dep't of Agric.*, 810 F.3d 916, 922 (9th Cir. 1987); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925 (10th Cir. 1974); and *Peterman v. USDA*, 770 F.2d 888 (10th Cir. 1986). BIO 9-11.

Conspicuously missing from the BIO is any explanation of why this distinction should make any difference. Both sections of the PSA contain identical language making it "unlawful" to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. §§ 192(a) & 213(a). The two provisions are part of the same statute, were enacted at the same time, and have the same legislative history. The difference is simply that the two sections regulate different actors in the same market. PSA § 202(a) applies to packers,

swine contractors, and poultry dealers with respect to meat, while PSA § 312(a) applies to stockyard owners, market agencies, and dealers. A single entity may even fall within *both* provisions. Respondent offers no reason why Congress would have used the same language to prohibit a stockyard owner or market agent from engaging in a particular practice, while allowing a packer or live poultry dealer to do the same.

Absent some compelling reason to the contrary, identical language in the same statute is interpreted in the same way. Respondent, however, does not even suggest that there is any reason for courts interpreting the PSA to depart from the "'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). And to the extent that the conflicting decisions are based on some as-yet-unexplained departure from that "normal rule," subjecting multistate actors to inconsistent legal obligations, that fact would provide an additional reason to *grant* certiorari, not deny it.

B. There Is A Conflict Among The Federal Courts Of Appeals.

The petition identified a longstanding conflict on the question presented between the Seventh and Eleventh Circuits, on the one hand, and the Ninth and Tenth Circuits on the other hand, and explained that decisions of the Eighth and Sixth Circuits add to the confusion. The petition also argued that the question presented is important and that the conflict requires this Court's immediate resolution—points that go largely unrebutted by the respondent. Rather than confront the conflict and its importance head-on, respondent frames the question

presented narrowly and seeks to slice away at the conflict case-by-case. As we now show, that strategy is unavailing.

1. Respondent first brushes aside the conflict between the Eleventh Circuit and the Ninth Circuit by noting that although *Spencer* and *Blackfoot* interpreted statutory language identical to that at issue here, they did not specifically involve 7 U.S.C. § 192(a). Tellingly, respondent does not dispute that in *Spencer*, 841 F.2d at 1454, the Ninth Circuit held that a showing of fraud alone, because it is "deceptive," may violate the PSA—a result that the Eleventh Circuit recognized as directly at odds with its decision here. Pet. App. 12a. Respondent never attempts to explain why identical language would be interpreted differently in two companion provisions of the same statute. Similarly, respondent does not deny that *Blackfoot* held that check-kiting violates the PSA because it is "deceptive," a decision that also conflicts with the rule announced by the Eleventh Circuit, but again dismisses the conflict because *Blackfoot* rested on § 213(a) rather than § 192(a). BIO 9.

In a further attempt to minimize the Eleventh Circuit's acknowledged conflict with the Ninth Circuit, respondent relies heavily on isolated language in *DeJong Packing Co. v. USDA*, 618 F.2d 1329 (9th Cir. 1980), and even suggests that *Spencer* is not controlling law in the Ninth Circuit because it deviates from *DeJong*. BIO 9. But as we explained in the petition (at 9 n.1), *Spencer* and *DeJong* are not irreconcilable because *DeJong* involved *only anticompetitive conduct* and thus had no occasion to address whether the PSA reaches other unfair or deceptive practices that do not have an anticompetitive effect. Respondent completely ignores this point. Indeed, the allegations at issue in *DeJong* were quintessential antitrust allegations involving a conspiracy by a group of packers to force auction stockyards to change their terms of sale. *Id.* at

1335 ("What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action; to obtain by concert of action market power not possessed by the purchasers individually and, by exercise of that market power, to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces."). Moreover, although not strictly relevant to the issues before it, the court noted that the PSA "may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose," and recognized that the Act "proscribes practices which the Sherman Act would permit." *Id.* at 1335 n.7.

2. Respondent's approach to the decisions of the Tenth Circuit—*Peterman* and *Hays*—is no different. In *Peterman*, the court upheld the Secretary of Agriculture's determination that a meat packer who employed "bait and switch" sales tactics had "engaged in unfair and deceptive practices" in violation of the PSA. 770 F.2d at 889. Respondent contends that *Peterman* does not conflict with the decision below because the court's opinion did not specifically address whether the packer had violated the prohibition on "unfair, unjustly discriminatory, or deceptive practice[s]" in 7 U.S.C. § 192(a) or in § 213(a). Of course, because the case involved a packer, it was § 192(a) and not § 213(a) that applied. *See* 770 F.2d at 889 ("Our study of the matter leads us to conclude that Peterman is a 'packer' engaged in 'commerce' and is otherwise within the ambit of the Packers & Stockyards Act."). But more importantly, that the court did not find it necessary to mention which specific PSA provision was involved in order to explain its conclusion that the conduct was "deceptive" under the PSA only underscores that it was irrelevant to the decision—as, indeed, it is irrelevant to all of the decisions that make up the circuit conflict.

Similarly, respondent dismisses the Tenth Circuit's decision in *Hays*, which held that a failure to pay for livestock violated

the PSA, because the case was predicated on violations of 7 U.S.C. § 208, which makes it unlawful to engage in practices that are "unjust, unreasonable, or discriminatory." But the opinion in *Hays* makes clear that the decision was not based on any differences between this language and the language of §§ 192(a) and 213(a). On the contrary, *Hays* relied on case law interpreting these other sections of the PSA and explicitly rested its decision on deference to the USDA and "the broad policy of the Act" (498 F.2d at 932), which, in *Hays*' view, does not require a finding of anti-competitive conduct.

3. Respondent also completely ignores decisions of the Eighth and Sixth Circuits that contribute to the confusion concerning the scope of the PSA. As we pointed out in the petition (at 9), although the Eighth Circuit has held that conduct likely to harm competition can establish a PSA violation, *Farrow v. USDA*, 760 F.2d 211, 214 (8th Cir. 1985), the Eighth Circuit has also held that a refusal to pay for livestock may violate the PSA, *Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978), as may the commingling of funds from shippers' and consignors' accounts by a market agent, *United States v. Donahue Bros.*, 59 F.2d 1019 (8th Cir. 1932). Further complicating the picture, the Sixth Circuit has held that even unintentional and harmless misweighing violates the PSA, but prefaced its conclusion by noting that misweighing can have an adverse effect on the market. *Parchman v. USDA*, 852 F.2d 858, 864 (6th Cir. 1988).

C. This Case Presents An Excellent Vehicle To Address And Resolve The Circuit Split.

Respondent suggests that the Court should deny certiorari because this case rests on the theory that Fieldale violated the PSA by terminating the Londons' contracts without economic justification, rather than on a theory of "predatory intent in

terminating the grower contracts." BIO 12 (quoting Pet. App. 15a n.8). According to respondent, petitioners failed "to preserve predatory intent as an alternative basis for imposing liability." BIO 4. This argument is a red herring.

First, the question whether the PSA requires a showing of competitive injury was squarely presented below, was analyzed at length by the Eleventh Circuit, and was resolved in a manner that avowedly placed the Eleventh Circuit on one side of a longstanding circuit split. The jury found that respondent terminated the petitioners' contract without economic justification and awarded them $164,000 on that count. Whether the petitioners could have pursued an alternative claim under a theory of predatory intent is irrelevant. The question is whether the conduct that the jury found unfair constitutes a violation of the PSA.

Second, as this Court has recognized, "predatory intent" is synonymous with "anticompetitive intent." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 256-57 & n.17 (1993) (citing cases). Anticompetitive *effect* may be proved inferentially by a demonstration of predatory *intent*. *Id.* at 257 n.17; *see also Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 696-98 & n.12 (1967). But the Londons did not set out to prove predatory intent or any other species of antitrust violation. Instead, what the Londons alleged, and what they successfully proved to the jury, was that Fieldale engaged in an unfair and deceptive business practice consisting of a contract termination without economic justification. The only question is whether that showing is sufficient, as a matter of law, to violate the PSA.

Further, respondent's assertion that the Londons "failed to present sufficient evidence to prevail under any legal standard" is simply wrong. BIO 13. The jury found that Fieldale

terminated the Londons' contract without economic justification, and the only issue is whether that finding establishes a violation of the PSA.

D. Respondent Does Not Meaningfully Address The Importance Of The Question Presented, The Disruptive Effect Of The Eleventh Circuit's Failure To Defer To The USDA, Or The Merits Of The Case.

Although respondent vigorously attempts to downplay the conflict among the circuits concerning the scope of the PSA, it does not meaningfully address our discussion of the importance of the question presented, the disruptive and incongruous effects of the Eleventh Circuit's failure to defer to the USDA, or the compelling case that the plain meaning and legislative history of the PSA contradict the Eleventh Circuit's holding.

1. As to the merits, respondent does little more than parrot decisions on the same side of the circuit conflict as the Eleventh Circuit. The fact that some courts have thoroughly analyzed the question and reached one conclusion, while other courts have throughly analyzed the question and reached the opposite conclusion, demonstrates that the issue is ripe for this Court's review. Although respondent emphasizes that the "monopoly of the packers" was the "chief evil" to which the PSA was directed (BIO 15), it does not confront the petition's argument that the PSA was also intended to protect against unfair and deceptive business tactics. *See* Pet. 13-15; *Spencer*, 841 F.2d at 1455 ("The primary purpose of the [PSA] was to 'assure fair competition and *fair trade practices* in livestock marketing, . . . [i]t was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.") (emphasis in original; citation omitted). Nor does respondent acknowledge, much less dispute, our arguments concerning the plain language of the